In the Supreme Court of the United States

October Term, 1904

THE UNITED STATES, APPELLANT,
v.
CHARLES R. FROST. } No. 34

CHARLES M. TROTTER, APPELLANT,
v.
THE UNITED STATES. } No. 35

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

[illegible]

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT, v. CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, APPELLANT, v. THE UNITED STATES. } No. 95.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On November 29, 1901, Charles M. Thomas, a captain in the United States Navy, filed his original petition in the court below, and afterwards, on January 17, 1902, filed an amended petition, alleging certain services as such captain in the Navy, and claiming that the same entitled him to an increase of 10 per cent on his pay proper under the acts of May 26, 1900 (31 Stat. L., p. 211), and of March 2, 1901 (31 Stat. L., p. 903). There is a further question as to the basis of computation of the said 10 per cent increase in case the court should hold the claimant entitled to such increase.

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There is also an additional claim for full sea pay for services rendered by claimant between December 2, 1899, when the officer was relieved as commander of the U. S. S. *Lancaster*, at Barbados, West Indies, and February 7, 1900, when he took command of the U. S. S. *Baltimore*, at Hongkong, China, and also on the 5th and 6th days of April, 1901, when in transit on a merchant steamer between Cavite, Philippine Islands, and Hongkong. Other matters at issue between the claimant and the Government, which both parties deem settled by the judgment of the court below, are therefore not at issue here. The various claims presented to this court for its consideration are as follows:

Between December 2, 1899, when the claimant was relieved as commanding officer of the U. S. S. *Lancaster* and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. *Baltimore* at Hongkong, China, he was paid only shore pay, $3,825 a year, the same being 15 per cent less than sea pay. He claims sea pay at the rate of $4,500 a year during that time.

From May 26, 1900, to March 1, 1901, he was paid sea pay of a captain at the rate of $4,500 a year, and he claims 10 per cent increase for services in the Philippines and in China, under said acts of May 26, 1900, and March 2, 1901. From March 2, 1901, to June 11, 1901, he was paid sea pay of a captain, $4,500 a year, and he claims 10 per cent increase for services outside the United States under the provisions of the act of March 2, 1901. From June 12, 1901, to September 30, 1901, he was paid sea pay at the rate of $4,500

a year, and he claims 10 per cent increase, under the act of March 2, 1901, for services outside the United States. During this time he was in the waters of San Francisco Bay, traveling from San Francisco to Puget Sound, and in the waters of Puget Sound. This last claim is provisional, in case his services in Chinese and Philippine waters are not considered to be service "in China" and "in the Philippine Islands," entitling him to 10 per cent increase from May 26, 1900, to March 1, 1901. In case the court should allow the increase of 10 per cent, as contended for by claimant, then there is the question as to the basis of computation of such 10 per cent increase. Claimant's counsel contend that the increase, where allowed, should be computed upon the full maximum pay to which the officer is entitled, including longevity pay; in other words, that the term "pay proper" means the entire pay, including the longevity increases, and that the 10 per cent of increase, if allowed, should be computed on said entire or maximum pay, including the longevity increase. The Government's contention is that the per cent of increase, if allowed, should be based upon the normal or minimum pay of the grade, and not upon the "current yearly pay," which includes increase of pay for length of service.

The cause was heard in the court below, and on the 5th day of January, 1903, the court dismissed the petition in all respects, except as to a claim for mileage. Subsequently the claimant's counsel filed a motion for a new trial, alleging various errors of law, and on the

1st day of June, 1903, the former judgment was set aside and judgment entered on the findings in favor of the claimant in the sum of $568.29. (See record, p. 25.) From the judgment so entered the United States takes this appeal, except as to that part of the judgment on claim for mileage, the Government now conceding that claimant is entitled to the mileage for which he contended. The judgment of the court below was in favor of the Government on the issue of sea pay while claimant was traveling between points, and from this judgment the claimant files his cross appeal. The findings of the court are set forth in the record, pages 6 to 9, inclusive.

ASSIGNMENT OF ERRORS.

The appellant assigns the following errors in the judgment of the Court of Claims:

1. The court erred in holding that the claimant is entitled to 10 per cent increase on any amount whatever.

2. The court erred in holding that the term "pay proper" includes longevity pay, and in holding that the computation of the 10 per cent increase should be made upon the full maximum pay, including longevity pay.

ARGUMENT.

In determining the various issues involved it will be necessary to consider the following statutes:

Section 13 of the so-called "navy personnel act" is as follows:

> SEC. 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers

of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty, but this provision shall not apply to warrant officers commissioned under section twelve of this act: *Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places: *Provided further*, That naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy, and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service. And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed: *And provided further*, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay ac-

cording to existing law: *And provided further*, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy.

(30 Stat. L., p. 1007.)

Section 1466, Revised Statutes, in fixing the status of officers of the Navy with reference to officers of the Army, and commonly termed "assimilated rank," provides as follows:

> The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army shall be as follows, lineal rank only being considered:
>
> The vice-admiral shall rank with the lieutenant-general.
>
> Rear-admirals with major-generals.
>
> Commodores with brigadier-generals.
>
> Captains with colonels.
>
> Commanders with lieutenant-colonels.
>
> Lieutenant-commanders with majors.
>
> Lieutenants with captains.
>
> Masters (afterwards lieutenants of junior grades) with first lieutenants.
>
> Ensigns with second lieutenants.

Section 1556 of the Revised Statutes, in fixing pay, emoluments, and allowances for commissioned officers and warrant officers on the active list of the Navy, provides in part as follows:

> The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal heavers, and employees in the Navy shall be entitled to

receive annual pay at the rates herein stated after their respective designations:

* * * * *

Captains, when at sea, four thousand five hundred dollars; on shore duty, three thousand five hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars.

Section 1261 of the Revised Statutes, in fixing the pay for the respective officers of the Army, provides in part as follows:

SEC. 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations:

The General: Thirteen thousand five hundred dollars a year.

Lieutenant-general: Eleven thousand dollars a year.

Major-general: Seven thousand five hundred dollars a year.

Brigadier-general: Five thousand five hundred dollars a year.

Colonel: Three thousand five hundred dollars a year.

Lieutenant-colonel: Three thousand dollars a year.

Major: Two thousand five hundred dollars a year.

Section 1262 of the Revised Statutes provides:

There will be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum on their current yearly pay for each term of five years of service.

In the statute, section 1466, Revised Statutes, fixing the status of officers of the Navy with reference to officers of the Army, it is seen that captains in the Navy rank with colonels in the Army. Under old navy pay captains received, when at sea, $4,500; on shore duty, $3,500. The fourth proviso of section 13, navy personnel act, prohibits the reduction of naval officers' pay received at the time of the passage of said navy personnel act. Therefore captains who were in the Navy at the time of the passage of said act, although ranking with colonels, continued to receive old sea pay as provided in said section 1556, Revised Statutes.

In the act of May 26, 1900, making appropriation for the support of the Regular and Volunteer Army for the fiscal year ending June 30, 1901, Congress provided in part as follows:

> For additional twenty per centum increase on pay of enlisted men, four million five hundred and twenty-four thousand seven hundred and fifteen dollars: *Provided*, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace. (See 31 Stat. L., p. 211.)

In the act passed March 2, 1901, entitled, "An act making appropriation for the support of the Army for the fiscal year ending June 30, 1903," Congress provided in part as follows:

Provided, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto:

Provided further, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for. (See 31 Stat. L., p. 903.)

The provisos of May 26, 1900, and March 2, 1901, do not relate to pay in general of army officers, hence the opening clause of section 13 of the navy personnel act has no application thereto.

It will be observed that the statutes quoted from the acts of May 26, 1900, and March 2, 1901, respectively, are *army appropriation acts*, and make provision for extra or increased pay for *particular officers* of the Army serving in *particular places*, and are not applicable to officers of the Army generally nor to the officers serving at any points without the places mentioned in the statutes.

Before the claimant can in any way be affected by these statutes it is necessary that they be construed as such legislation on the question of pay, as was foreseen and contemplated by that part of section 13 of the Navy

personnel act, which provides that officers of the Navy shall "receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Inasmuch as the statutes relate to Army officers serving in specific and particular places, designated and pointed out in the acts, and do not refer to officers of the Army in general, we contend that the statutes are not such legislation as was contemplated by the opening clause of said section 13.

We contend that the navy personnel act, in placing officers of the line of the Navy upon the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for officers of corresponding rank in the Army was intended by Congress to apply only to a *general law affecting all officers of the Army regardless of the place they may serve* and had reference to the regular compensation of officers of the Army generally as distinguished from any extra pay, allowances, or compensation that might be granted to *particular or specific officers serving in specific and designated localities.*

The law affecting the pay of all officers of the Army is found in sections 1261 and 1262 of the Revised Statutes, which sections provide for the salary of all officers of the Army, including longevity pay.

The effect of the opening clause of said section 13 is to give officers of the Navy the same pay and allowances, except forage, as are provided by the general law found in sections 1261 and 1262, Revised Statutes,

affecting all officers of the Army. And in case any future law should be passed by Congress modifying or repealing the general law as found in said sections 1261 and 1262, fixing the compensation for *all officers of the Army*, then the pay of officers of corresponding rank in the Navy would, as provided by the opening clause of section 13, be correspondingly affected, regardless of the place or condition of service.

But the statutes relied upon by claimant simply grant 10 per cent increase to that *part of the officers of the Army* serving in specific places designated in the statutes, and therefore they can not reach or affect naval officers performing regular sea duty, even though that sea service may be performed in waters adjacent to the land where the specific army officer is located who receives the 10 per cent increase by reason of said statutes.

In seeking to ascertain the meaning of any statute the student first looks to the words and language employed, and "if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument," then the statute is said to "interpret itself," and needs no further interpretation. It is only where the language used is ambiguous and doubtful that it is permissible to look elsewhere for the meaning of the legislators than to the language employed in the statute.

The word "Army," used in the opening clause of said section 13, in its ordinary and usual sense means the Army as a unit, the same usual and ordinary meaning that the word has in the Constitution of the United

States, which makes provision that "the President shall be Commander in Chief of the Army and Navy of the United States." It means the land forces of the United States taken as a single whole and has not the restricted sense of any one department or division of the Army distinct from the whole United States land forces. It does not mean that part of the Army engaged in the Philippines, China, or elsewhere. The President is not limited to be Commander in Chief of the army serving in the Philippines or China, nor to that part of the army serving in Porto Rico, Cuba, Hawaii; nor is he limited as commander in chief to that part of the Army "serving beyond the limits of the States comprising the Union and Territories of the United States contiguous thereto," but he is the commander in chief of the Army of the United States. Hence we insist that the word "*Army*" as here used is synonymous with the words "*the entire land forces of the United States*," and it is undoubtedly in this sense Congress intended the word to be understood. We contend, then, that a fair and intelligent interpretation of the first paragraph of section 13 of the Navy personnel act is, that only such *general statutes* as affect the pay of *all the officers of the Army* could affect the pay of the officers of the Navy; and if a general law concerning the pay of *all officers of the Army* should be passed whereby pay of *all officers of the Army* would be increased or diminished, then the pay of Navy officers of corresponding rank would be increased in accordance therewith.

LEGISLATIVE CONSTRUCTION.

Should the court be in doubt as to the meaning of the first paragraph of section 13, when considered in connection with the statutes granting the 10 per cent increase to army officers, then it is permissible to ascertain that meaning, if possible, from the various acts of Congress subsequently passed relative to the pay of the Army and Navy. The general tenor of subsequent legislation on the question of pay for the Army and Navy seems to lead to the inference that Congress did not intend naval officers doing sea service to receive the 10 per cent increase for which claimant brings this action. In making appropriations for the naval service for the fiscal year ending June 30, 1902, which act was passed March 3, 1901 (see 31 Stat. L., p. 1107), just one day after the passage of the act making appropriation for the support of the Army, Congress said, under the head of a proviso on page 1108 of said Statutes at Large:

> That officers of the Navy, and officers and enlisted men of the Marine Corps, who have been detailed, or may hereafter be detailed, for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere, beyond the continental limits of the United States, shall be considered as having been detailed for "shore duty beyond seas," and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States.

It will be observed in reading the foregoing statute that *enlisted men* of the Marine Corps, as well as certain officers, shall receive the additional pay provided by

law for service in island possessions of the United States. Section 1612 of the Revised Statutes provides as follows:

> The officers of the Marine Corps shall be entitled to receive the same pay and allowance, and the enlisted men shall be entitled to receive the same pay and bounty for reenlisting, as are or may be provided by or in pursuance of law for officers and enlisted men of like grades in the infantry of the Army.

The last quoted statute is similar to and indeed almost in like terms as the first paragraph of section 13 of the Navy personnel act. It places *enlisted men* of the Marine Corps upon the same pay as is or may be provided by or in pursuance of law for the *enlisted men* of like grades in the infantry of the Army. Now, if claimant's contention is correct, enlisted men in the Marine Corps when serving in Chinese and Philippine waters should receive the additional 20 per cent provided for by the statutes giving the increase of 20 per cent to enlisted men in the Army, and this they would receive without any further legislation. But enlisted men in the Marine Corps doing duty in Philippine and Chinese waters were not paid the same increase as provided by the statutes for the enlisted men in the Army, and Congress, in order to place them in a like position when doing duty similar to the enlisted men in the Army, made a special provision in the statute of March 3, 1901, whereby they should receive pay corresponding with that of the enlisted men of the Army when doing shore service. The enlisted man in

the Marine Corps receives the additional 20 per cent by reason of the express statute giving it to him, and then only when doing shore duty, and does not receive any increase on his pay when performing duty in the nature of sea service. If it were necessary to pass a special statute providing that the marines should receive the increase provided in the army appropriation acts, and this, too, despite of the fact that the marines were placed upon the same pay as the enlisted men of the Army by the general statute found in section 1612, it would seem that naval officers under the opening paragraph of section 13 of the navy personnel act would not be entitled to the 10 per cent increase except by a special statute. And Congress recognized this in the second proviso of the navy personnel act. Therefore we may justly conclude that had it been the intention of Congress to place officers doing sea service on 10 per cent increase of their pay it would have expressly stated that intention in the act of March 3, 1901.

Section 1569 of the Revised Statutes provides as follows:

> The pay to be allowed to petty officers, excepting mates, and the pay and bounty upon enlistments of seamen, ordinary seamen, firemen, and coal heavers in the navy service shall be fixed by the President: *Provided*, That the whole sum to be given for the whole pay aforesaid, and for the pay of officers and for the said bounties upon enlistments, shall not exceed, for any one year, the amount which may be in such year appropriated for such purposes.

It will be seen by the foregoing statute that the President and not Congress fixes the pay of enlisted seamen and ordinary seamen in the naval service. The number of seamen, ordinary seamen, firemen, coal heavers, and sailors in the naval service whose pay is fixed by the President now approximates 30,000 men. A very large portion of these have been doing service in Philippine waters, Chinese waters, and in other waters beyond the continental limits of the United States. No increase of pay has been fixed by the President for these men corresponding with the increase of pay fixed by Congress for the enlisted men in the Army doing service in the Philippine Islands and in China. Neither could the President grant a corresponding advance of pay for services of these seamen, for the reason that Congress made no provision or appropriation whatever whereby the increase if fixed by the President could be paid to the ordinary seamen. Had Congress intended the special provisos in the acts of May 26, 1900, and March 2, 1901, granting extra pay to officers of the Army, to be such legislation as was contemplated in the opening paragraph of section 13, and that the officers of the Navy would receive increased pay by reason of such legislation, it certainly would not have discriminated against the large number of seamen, sailors, and petty officers who manned the ships that were commanded and under the orders of the naval officer who is contending for his 10 per cent increase.

It would seem that Congress should have made some provision granting a greater appropriation in order that

the President might increase the pay of the common sailor or seaman if the pay of his naval officer was to be increased when doing sea service. In fact, if claimant's contention is correct, the pay of all officers and men in the Army, Navy, and Marine Corps who did service and are doing service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, was increased 10 per cent for officers and 20 per cent for the enlisted men, *excepting the common seamen* on the vessel and the *enlisted men* in the marine when *not doing shore service.* We can not think that Congress intended this discrimination. It is more reasonable to conclude that it was the intent of Congress to place army officers and enlisted men in the Army on increased pay when exposed to the hazards and discomforts of oriental warfare; and to place the naval officers on the increased pay only when they were doing duty on shore and exposed to like hardships; and that the service of all naval officers and of seamen, the common sailor included, the petty officers and the marines, when doing sea service was regarded as simply normal duty.

On June 7, 1900, some twelve days after the passage of the act of May 26, making provision for increased pay to officers of the Army, serving in particular places named in the statutes, Congress passed an act making appropriations for naval officers for the year ending June 30, 1901. (See 31 Stat. L., p. 684.) In said last-mentioned act Congress made no provision for the increased pay contended for by claimant, and had

it intended to confer upon naval officers at sea the same kind of increase as provided for in the act for appropriation for the Army, it surely would have expressed the will and intent of the legislators in the act making appropriations for the Navy. In the latter act Congress dealt with mileage to naval officers and the minds of the legislators were directly centered upon the Navy and the officers thereof. The silence of Congress in this act upon the subject of increase is certainly evidence that it did not intend to confer such increase.

Again, in making appropriation for naval officers for the fiscal year ending June 30, 1902, which act was passed March 3, 1901, just one day after the passage of the act making appropriation for the support of the Army, Congress said: "That officers of the Navy * * * who have been detailed, or may hereafter be detailed, for *shore duty* in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for shore duty beyond seas, and shall receive pay accordingly, with such additional pay as may be provided by law for services in island possessions of the United States." Now, it will be observed that this statute confers upon naval officers additional compensation when they have been detailed for *shore duty* in the places mentioned, showing conclusively that Congress did not intend, by either the act of May 26, 1900, or of March 2, 1901, to confer upon naval officers additional 10 per cent to their services for *sea duty*. If Congress so specifically set

forth that naval officers should receive certain increase for shore duty in certain localities, we may justly conclude that had it intended naval officers performing sea service in those localities to receive the 10 per cent increase, it would have specifically legislated to that purpose.

EFFECT OF STATUTE OF MARCH 2, 1901, IF CLAIMANT'S CONTENTION IS CORRECT.

It will be observed by reading the statute of March 2, 1901 (31 Stat. L., p. 903), that provision is made for an increase of 10 per cent for officers and 20 per cent for enlisted men of the Army over and above the rates of pay proper for those army officers and enlisted men "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

Under claimant's contention all naval officers doing sea service are entitled to the increase of 10 per cent, provided the service is "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

Our Navy is nearly always "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto," and the greater portion of our naval officers, in fact nearly all of them doing sea service, are beyond the limits named in the statutes.

All those naval officers of that portion of our Navy which recently took part in the maneuvers in the Caribbean Sea and other places for drill and practice,

would be entitled to the increase under claimant's contention.

The normal place of service of the naval officer is not cruising around the shores and within the three-mile limit of the continental limits of the United States, but it is doing sea service in visiting ports of different nations, taking part in naval maneuvers, and performing various kinds of duties in all parts of the world.

Keeping in mind that the normal place of service of naval officers is upon the ships and vessels in commission of the United States, and that the ship furnishes conveniences, comforts, and a home for the officer, it does not seem reasonable that Congress, when providing the increase of 10 per cent for officers of the Army doing extra and hazardous duties, intended that naval officers performing their normal duty, which is sea service, should be entitled to the same rate of increase under and by force of the provisions of the first paragraph of section 13 of the navy personnel act. Such a construction would give the increase on their pay proper to nearly all officers of our Navy, and if the construction contended for by claimant is correct, Congress might as well have passed the broad, sweeping statute declaring *that all officers of the Navy doing sea service shall receive 10 per cent increase on their pay proper.*

PURPOSE OF NAVY PERSONNEL ACT THAT EQUALIZATION OF PAY OF THE ARMY AND NAVY OFFICERS OF EQUAL OR CORRESPONDING RANK.

It has always been recognized that the object and purpose of the Navy personnel act was the equalization of pay of army and naval officers holding equal or corresponding rank. Yet if claimant is correct in his contention, then Congress has unequally increased by 10 per cent the pay of naval officers doing their normal sea service, but has not increased the pay of army officers doing normal duty, which duty is within the continental limits of the United States.

But extra pay is only granted to army officers doing service in the places designed in the statute, which places were not the normal places of service. And it is in view of the fact that such places of service were not in contemplation when Congress fixed the pay proper, or the pay of the rank of the army officer for normal service, that extra pay is given for extra services of army officers performing duty outside the normal places of service. But with the naval officer, Congress fixed the pay of his grade having in view the officer's normal and usual service, to wit, service upon ships being duty outside the continental and beyond the 3-mile limit of the continental limits of the United States and the Territories contiguous thereto.

Again, claimant's pay of his rank, exclusive of any longevity pay, when doing sea duty is $4,500 per year, and his rank corresponds with the rank of colonel in the Army, the pay of which rank of colonel,

exclusive of longevity pay, is $3,500 a year. A colonel of the Army serving at either of the points designated in the statute is entitled to 10 per cent increase upon his $3,500, which in one year would amount to $350. Claimant contends that he is entitled to 10 per cent increase upon his $4,500, which in one year would amount to $450.

Thus it will be seen that claimant contends, for extra services in the waters adjacent to where the Army officer is doing duty, $100 per year more extra pay than his brother Army officer of corresponding or equal rank.

We do not believe that Congress intended any such discrepancy. Such a construction as contended for by claimant would do violence to the object of the Navy personnel act, which is the equalization of pay of the Army and Navy officer of equal or corresponding rank.

BASIS OF COMPUTATION OF 10 PER CENT INCREASE.

"PAY PROPER."

We now come to the question as to the basis of computation of the 10 per cent increase. Claimant's counsel contend that the increase where allowed should be computed upon the full maximum pay to which the officer is entitled, including longevity pay. The Government's contention is that the per cent of increase where allowed should be computed upon the normal or maximum pay of the grade and not upon the current yearly pay, which includes the increase of pay for length of service. The question presented turns upon

the meaning of the words "pay proper," as used in the statutes of May 26, 1900, making appropriations for the support of the Regular and Volunteer Army for the fiscal year ending June 30, 1901, and as used in the statute passed March 2, 1901, which statutes we have already quoted.

In April, 1898, Congress passed an act entitled "An act for the better organization of the line of the Army of the United States," and section 6 of said act provides in part as follows:

> That in time of war the pay proper of enlisted men shall be increased twenty per centum over and above the rates of pay as fixed by law.

Section 1612 of the Revised Statutes is in part as follows:

> The officers of the Marine Corps shall be entitled to receive the same pay and allowances and the enlisted men shall be entitled to receive the same pay and bounty for reenlistment as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army.

It will be seen that the foregoing is very similar to that portion of section 13 of the naval personnel act which provides that officers of the Navy shall receive the same pay, etc., as officers of corresponding rank in the Army.

The question was presented to the Comptroller of the Treasury as to whether, under section 6 of the act of April 26, 1898, the increase of 20 per cent of pay proper of enlisted men over and above the rates of pay

as fixed by law should be computed upon the minimum pay of each grade or upon such minimum pay increased by additional pay for length of service. The question was exhaustively considered by him, as follows:

> The second question is one of much greater difficulty. Section 1280, Revised Statutes, specifies the rate of pay of each grade of enlisted men of the Army. Sections 1281 and 1282, Revised Statutes, prescribe additional pay for enlisted men for length of service over and in addition to the rates of pay prescribed in said section 1280. Section 1284, Revised Statutes, prescribes for reenlisting, after five years' service, another additional increase of pay over and in addition to the rates of pay prescribed in said sections 1280, 1281, and 1282. Section 1285, Revised Statutes, prescribes another additional increase of pay of enlisted men of $2 per month on account of a certificate of merit issued for distinguished services upon recommendation of the President. All of said additional increases of pay of enlisted men, to which they may, upon certain conditions, become entitled, when they become so entitled are paid to them regularly, the same as they are paid the pay prescribed for them under said section 1280. The question presented turns upon the meaning of the words "pay proper of enlisted men," as used in said section 6 of the act approved April 26, 1898. Was it intended by said section 6 to limit the 20 per cent increase to rates of pay prescribed in said section 1280, being the minimum or lowest pay of each grade,

or was it intended that the 20 per cent increase should also be computed upon the additions to a soldier's pay to which he may be entitled for length of service, reenlisting, or a certificate of merit? The term "pay proper" seems to have been employed in the earlier decisions and opinions as a means of distinguishing with greater accuracy between "pay" and "allowances." On August 15, 1852, Second Comptroller Phelps, in passing upon a claim for emoluments or allowances under a private act granting 35 years' half pay, used the following language:

"The term 'half pay' is one that is very commonly used in our statutes, and has long ago acquired in commerce, as well as at the Departments and in the courts, a distinct and well-understood legal significance. It has always been construed to mean half the *pay proper* of the officer, exclusive of his emoluments and allowances, which are entirely distinct from the pay, are greater in amount, authorized by different enactments, and payable out of other appropriations.

"A familiar instance of this construction will be found in the numerous military and naval half-pay pensions which have always been understood as authorizing half pay proper."

In computing the three months' extra pay given by the act of July 19, 1848 (9 Stat., 248), for service in the war with Mexico, it was the rule to include only what the soldier was entitled to receive by way of stated compensation, as distinguished from allowances or emoluments; and, in order to more clearly define the distinction, the words "pay proper" were used

in the decisions construing said act. The words "pay proper" were apparently first used in legislation in section 4 of the act of March 3, 1865 (13 Stat., 497), which granted an addition of three months' *pay proper* to certain officers of the Volunteer Army who should serve to the end of the war, to be paid on their discharge. The words were also used in section 1, act of March 2, 1867 (14 Stat., 422), granting an increase of 33⅓ per cent of the *pay proper* of certain officers of the army for two years after July 1, 1866. In computing the three months' pay proper under the act of March 3, 1865, where an officer was discharged after July 1, 1866, and was therefore entitled to the one-third increase provided for in said act of March 2, 1867, such increase was included, thus treating it as a part of "pay proper." (Dec. Second Comptroller, vol. 45., p. 129.) These cases are the only ones I have been able to find where the words "pay proper" have been construed as including or excluding increased pay. Officers of the Army, before the act of 1867, received no increase over their regular rate of pay, except by way of rations for longevity under the act of July 5, 1838 (5 Stat., 258), which was never treated as pay. Since the legislation and decisions above referred to the words "pay proper of enlisted men" have been employed in different appropriation acts with such uniformity as to give them a definite and technical meaning. In the act of June 30, 1886 (24 Stat., 93), making appropriations for the support of the Army, separate and distinct

appropriations were made for the "pay proper of enlisted men of all grades" and for "pay to enlisted men by reason of length of service in addition to their regular pay." Appropriations have been made in substantially the same language for each succeeding year from 1886 to the present time.

In the act of Congress entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1899," approved March 15, 1898, is the following provision:

"PAY OF ENLISTED MEN.

"For pay proper of enlisted men of all grades, four million two hundred and ninety thousand dollars.

"Additional pay for length of service, including hospital corps, six hundred seventy-one thousand one hundred and seventy-two dollars."

Statutes upon the same or similar subjects should be taken into consideration in construing the law, and the same meaning given to the same words used in both, unless a contrary meaning is clearly intended. By the above act, and in each act making the annual appropriations for the support of the Army from and including 1886 to the present time, Congress has so distinguished "pay proper of enlisted men" from "additional pay for length of service" as to amount to a legislative declaration that in the use of the words "pay proper of enlisted men" it does not mean "additional pay for length of service."

In reply to your inquiry I have the honor to advise you—

1. That said section 6 of the act approved April 26, 1898, is applicable to the Marine Corps.

2. That the increased 20 per centum of pay of enlisted men over and above the rates as fixed by law, as provided in section 6, should be computed upon the minimum grades of pay of enlisted men. This does not affect the "additional pay for length of service" of enlisted men as now provided by law. It increases the minimum pay of all enlisted men in time of war 20 per centum, and places all of them, so far as said increase is concerned, upon an equality, which was the intention of Congress as I construe said section 6.

(4 Comp. Dec., 669–672.)

THE TYLER CASE.

"CURRENT YEARLY PAY."

The claimant relies upon the case of *Tyler* v. *The United States* (105 U. S., p. 244). The statute under consideration in the Tyler case is as follows (section 1262):

> There shall be allowed and paid to each officer below the rank of brigadier-general, including chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service.

Claimant's counsel insist that this statute involves substantially the same question as the law under consideration. An examination of the case cited will convince anyone that there is practically no similarity between the case at bar and the Tyler case. In the

Tyler case the court was construing the meaning of the words "current yearly pay" for the purpose of fixing the basis for 10 per cent longevity pay, and the court said:

> We also hold that the words "current yearly pay" in section 1262 require that, when the increased pay for any period of five years is to commence, the 10 per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of 10 per cent previously earned for periods of five years, constitute the current yearly pay on which said 10 per cent is to be calculated.

It will be seen that the court applies the term "regular salary" to the salary as fixed by section 1261, which said regular pay plus the increased pay, in the opinion of the court, constituted the officer's "current yearly pay."

There the court was simply construing the term "current yearly pay," as found in section 1262. It may be pertinently added that immediately after this decision Congress provided—

> that from and after the first day of July, eighteen hundred and eighty-two, the ten per cent increase for length of service allowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes, shall be computed on the *yearly pay of the grade* fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four Revised Statutes. (See 22 Stat. L., p. 118.)

But in the case at bar the court is not required to construe the phrase "current yearly pay." The words do not occur in the statute under consideration. The court is required to give its interpretation of the words "pay proper," as used in the act of May 26, 1900, and the act of March 2, 1901.

The word "current," as used in the phrase "current yearly pay," has a definite and fixed signification. "Current yearly pay," as used in the Tyler case, means the current or running pay of the officer, including all extras, percentages, and everything that is included in the sum total of the officer's pay. The term "pay proper," however, would seem to be the pay of the grade aside from all extras and allowances. When speaking of the "pay of the grade," we mean the pay of the grade as fixed by section 1261 of the Revised Statutes. What better or more distinctive term could Congress have used in the various acts granting extras and allowances than the term "pay proper?" The pay fixed by section 1261 properly speaking is the pay of the officers therein mentioned and therefore is the "pay proper," all additions to this pay being extra pay, by reason of longevity, or of some particular place or time of service and allowance. Taken, therefore, in the light of all legislation upon the subject of pay and giving the words their normal meaning, the phrase "pay proper" is the appropriate and natural language to designate the pay described in section 1261, as distinguishing it from the full compensation, with all extras, longevity pay and allowances, added thereto.

FULL PAY IN TRANSIT AND RECEIVING ORDERS.

The court below did not allow the claim for full sea pay for services between December 2, 1899, when relieved as commanding officer of the U. S. S. *Lancaster*, at Barbados, West Indies, and February 7, 1900, when he took command of the *Baltimore* at Hongkong, China, during the most of which time he was traveling from one post of duty to the other; neither did it allow him full pay for his services on the 5th and 6th days of April, 1901, when in transit on a merchant steamer between Cavite, Philippine Islands, and Hongkong. From the judgement of the court on these items the claimant appeals, and inasmuch as the two appeals will undoubtedly be heard by the court at the same time, we here present the Government's contention on the claim in which the judgment of the court below was adverse to claimant.

As will be seen by finding 2 (p. 6 of the record), the claimant was relieved as commanding officer of the *Lancaster* December 2, 1899, and ordered to report to the Navy Department. He did so report December 12, 1899. On December 13, 1899, he was ordered to proceed to Hongkong for duty on the Asiatic Station, and sailed by merchant steamer from San Francisco January 6, 1900, and reported in obedience to orders at Hongkong, February 7, 1900, and was so placed in command of the U. S. S. *Baltimore*. It will be seen by the second claim (p. 11 of the record) that between the above dates of December 2, 1899, and February 7, 1900, he was paid shore pay at the rate of $3,825 a

year, which was 15 per cent less than sea pay, and he claims sea pay at the rate of $4,500 a year during said time. As to why Congress, by the first provision in section 13 of the navy personnel act, fixed the pay of a navy officer at 15 per cent less while doing shore duty is probably not necessary to investigate. The proviso is a part of the subject-matter upon which Congress was legislating in section 13, and is in plain, unambiguous terms which need no interpretation. The presumption is that Congress had a definite purpose in the enactment of said section and that it adopted and formulated the proviso of 15 per cent less pay when on shore duty in accordance with its view of harmony with that purpose.

Claimant's counsel necessarily contend that while claimant was traveling from Barbados to New York and during the time consumed in reporting to the Department and awaiting further orders and his travel to Hongkong on merchant steamer, he was not performing shore services but was on sea duty and therefore that he should receive his full normal pay while performing such duty. As the claimant during this time was not attached to a sea going vessel and was not attached to a vessel doing sea service until his arrival at Hongkong, he certainly can not contend that he was at sea, within the meaning of section 1571 Revised Statutes, which is as follows:

> No service shall be regarded as sea service except such as shall be performed at sea under the orders of the Department and in vessels employed by authority of law.

The foregoing section has reference to officers and seamen who have duties to perform in connection with the ship to which they are attached. As seen by the second finding of fact, claimant was relieved as commanding officer of the *Lancaster* and was not again attached to a seagoing vessel, nor had any duties whatever to perform concerning the responsibilities or management of a seagoing vessel, until his assignment to the *Baltimore* upon his arrival at Hongkong. He traveled on a merchant steamer to a point where he received his orders. He, therefore, was simply performing travel necessary to be performed in going to the Asiatic station where he had been ordered to report, and was not doing sea duty within the meaning of that term; neither was he attached to a seagoing vessel. In order that he might receive full compensation for this time he was allowed by the accounting officers pay at the rate of shore service. This service the naval authorities denominated shore duty. Claimant had none of the duties, cares, or responsibilities of an officer doing sea service. He had no control or responsibility of the merchant steamer upon which he was a passenger. He did absolutely nothing that could be construed into sea service under said section 1571.

In the case of *Ryan* v. *The United States*, decided by the Court of Claims January 5, 1903, this question was before the court, and the court, speaking through his honor Judge Peelle, delivered the following strong

and forcible opinion, which best states our position on this question:

> The question is, What was his status in respect to pay while en route to the Asiatic Station on board the mail steamer?
>
> It is our duty to give effect to the statute, if that can be done, and to do that we must of necessity determine which rate of pay provided for by section 13 the claimant is entitled to.
>
> By the purview or enacting clause of section 13, the officers of the line of the Navy and of the Medical and Pay Corps are given but one rate of pay, i. e., the higher or normal pay, but when serving on shore the first proviso thereto carves special exceptions out of the enacting clause and gives them "the allowances, but 25 per centum less pay."
>
> The exceptional pay, therefore, is shore pay, while the higher is sea pay, both dependent upon the character of the service to which they may be assigned by the Navy Department, whose orders in that respect are controlling if not in conflict with the law.
>
> The act of 1899 does not repeal or in any way modify Revised Statutes, section 1556, defining what shall constitute sea service, and as that section has been the subject of judicial construction in numerous cases, both by the Supreme Court and this court, it only remains for us to ascertain the purport of those decisions.
>
> In the *Symonds case* (21 C. Cls. R., 148), affirmed by the Supreme Court (120 U. S., 46, 50), the latter court says: "We concur in the conclusion reached by the Court of Claims.

namely, that the sea pay given in section 1338 may be earned by service performed under the orders of the Navy Department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high seas.

The case of *Bishop v. The United States* (31 C. Cls. R., 253) was affirmed by the Supreme Court (170 U. S., 54) for the reasons set forth in the Symonds case.

In the *Barnette case* (30 C. Cls. R., 107), affirmed by the Supreme Court (165 U. S., 176), the latter court said: "In order to come within the phrase 'at sea,' as used in this statute, it is not necessary that the vessel upon which the service is performed should be upon the high seas. It is enough that she is water borne, even if at anchor in a bay, port, or harbor, and not in a condition presently to go to sea. It has correctly been adjudged by this court that a vessel is 'at sea,' within the meaning of the statute, although she is used as a training ship, anchored in a bay, and not in a condition to be taken out to sea beyond the mainland, or is used as a receiving ship at anchor in port at a navy-yard and connected with the shore by a rope and having a roof built over her deck, and not, technically, in a condition for sea service."

In that case the officer claiming sea pay lived on board the vessel, wore his uniform, and was subject to the regulations respecting sea service; and so in the case of *Wright* (36 C. Cls. R., 288), where the officer in command of the U. S. S.

Nipsic, at anchor in the bay at Puget Sound (with a force on the vessel in the employment of the Bureau of Yards and Docks), the regulations applicable to a vessel at sea were observed, and the officer's quarters remained continuously on board, and for that reason he was allowed to recover sea pay.

In the *Hannum case* (36 C. Cls. R., 99), where an officer was directed to proceed to League Island Navy-Yard, Pa., for duty in charge of the machinery of the U. S. S. *Columbia* and the *Minneapolis*, and thereafter to take charge of the U. S. S. *Yankee*, in addition to his former duty, yet as the claimant lived on board the U. S. S. *Columbia* during that time and conformed to all the regulations governing vessels in commission, in the same manner as other officers attached to seagoing vessels, he was for that reason allowed to recover the sea pay of his grade.

In the *McGowan case* (36 C. Cls. R., 63), though the vessel had its crew and there were attached thereto medical and pay officers, chaplain and engineer and warrant officers, the officer in command of the vessel, who was also commander of the training station, took his meals at quarters assigned to him on shore, and the marines under his command were also quartered in barracks on shore, but as the time spent in actual duty on shipboard was not segregated from that performed on shore, he was not allowed to recover sea pay, the court saying:

"When a duty partakes of the character of sea service and shore duty, the facts of each particular case must be considered, and if from

the whole case there is a preponderance in favor of either service, the service having the paramount character must constitute the basis on which to predicate the right of payment."

In the recent case of *Taussig* (38 C. Cls. R., ——) the officer was assigned to the command of a vessel in the Coast and Geodetic Survey, but it was not shown that the claimant lived aboard the vessel or took his meals there. On the contrary, it was shown that his duties as hydrographic inspector were of far more importance than his duties as commanding officer of the vessel, and for that reason he was held not entitled to recover sea pay.

But we need not refer to other cases in support of the principles announced in the Symonds and Strong cases. The clear meaning deducible from them all is that to entitle an officer to the higher rate or sea pay provided by section 13, act of 1899, it must appear that such officer performed service "at sea under the orders of a Department and in a vessel employed by authority of law." Such we conceive to be the meaning of those cases—not that such service must have been performed on the "high seas beyond the sight of land," but such services must have been "performed under the orders of the Navy Department in a vessel employed by authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high seas," as held by the Supreme Court in the Symonds case, supra.

The character of the claimant's service, however, on board the U. S. transport *Monongahela*, from which he was detached and ordered to report to the Asiatic Station, is not in question in this case. The question is: Was the claimant's travel in a merchant vessel sea service within the meaning of section 1571 as construed by the Supreme Court and this court in the cases to which we have referred?

To so hold would not only be in conflict with the order of the Secretary of the Navy detatching the claimant from the vessel on which alone sea service can be performed, but would clearly not be in harmony with the decisions to which we have referred and would, in our opinion, be also in conflict with the express language of section 1571.

The status of an officer on sea or shore duty must be determined by the order of assignment by the Navy Department, whose order, in so far as it does not change the character of the service defined in section 1571, is controlling. That is to say, it is for the Navy Department to determine when and where an officer shall be assigned to duty and when he shall be detached therefrom; and while the service performed under such order will determine the basis of his pay, the order otherwise is conclusive on the court.

And so we must hold that when the claimant was "detached from duty on board the U. S. T. S. *Monongahela*" he thereby ceased to perform sea service, and consequently ceased to be entitled to sea pay and became entitled to the

exceptional pay known as shore pay, provided for by the proviso to section 13, act of 1899, which shore pay continued until he was again ordered to duty on a vessel at sea "employed by authority of law."

It follows that when an officer is detached from duty on board a vessel in which he performed sea service that his sea pay ceases and his shore pay begins, though he may thereafter travel by sea on a merchant vessel from one post of duty at sea to another.

The rule may seem harsh, but it is the law embodied in that section. That is to say, travel in a merchant vessel at sea is not sea service within the meaning of section 1571, as construed by the Supreme Court as well as this court, and our duty is to give effect to the statute in harmony with those decisions.

SHORE DUTY BEYOND SEAS.

Claimant's counsel say:

> His right to full pay on merchant steamers is not affected, even if section 1571 remains in force. If that section declares that the claimant was not engaged in "sea service" while so traveling, it necessarily follows that he was "on shore" within the meaning of the law, even if actually at sea. As he was traveling on duty under orders, he was on shore duty. While at sea outside the boundaries of the United States and its waters he was "beyond seas."

And it is argued that inasmuch as the claimant was beyond seas he should receive the same pay and allowances as an officer of corresponding rank in the Army

detailed for shore duty beyond seas. In other words, that where claimant's services were considered by the accounting officers as shore duty, he is entitled for such services to full pay by reason of the second proviso of said section 13.

In reply we insist that the officer was performing duty under orders which referred to shore duty within the continental limits of the United States. The order is found on page 2 of the record, dated December 13, 1899, and directed the claimant to proceed to San Francisco, thence to Hongkong, taking passage in a steamer sailing on a certain day, and required that the officer should report to the commander in chief of the Asiatic Station for further instructions upon the arrival of claimant at Hongkong. This order was dated at Washington and addressed to Captain Thomas at Yonkers, N. Y. His status, then, upon the receipt of said order, was that of an officer doing shore duty within the continental limits of the United States. He had been detached from the U. S. S. *Lancaster*, and had no further connection therewith. He had not been attached to any other vessel.

This status of this officer doing shore duty within the continental limits of the United States under the order as found on page 2 of the record could not be changed until he was assigned to duty by the commander in chief of the Asiatic Station. The mere fact that the vessel on which Captain Thomas sailed from San Francisco crossed the boundary line of the 3-mile limit did not change this status from shore duty within

the continental limits of the United States. Furthermore, it must be borne in mind that the officer had no responsibilities whatever during the time he was performing the travel going to the point where he was to receive instructions. The proviso in section 13 reads: "Naval officers detailed for shore duty beyond seas," which necessarily implies that the officer is detailed to perform duties to which there are attached certain responsibilities and labors in connection with taking charge of property belonging to the United States Government and commanding men placed under his control, such as commandants at navy-yards, or possibly for inspection duty, as to the inspection or material for vessels and other work being constructed by the United States. But this officer had no such responsibilities, nor any such duties to perform. It can not, therefore, be said that he was detailed for "shore duty beyond seas" in the ordinary acceptation of the term.

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